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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

SANDRA HALLER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Sandra Haller prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on April 25, 1973.

OPINIONS BELOW

The District Judge did not render an Opinion. The Opinion of the Court of Appeals is reported at 477 F2d 453. It is printed as Appendix A, *infra.*

JURISDICTION

The Judgment of the Court of Appeals was entered on April 25, 1973. (Appendix B, *infra).* A timely Petition for Rehearing was denied on May 31, 1971 (Appendix C, *infra).* Jurisdiction is conferred upon this Court by 28 USC 1254. This Petition is out of time as explained in the Reasons For Granting The Writ.

QUESTIONS PRESENTED FOR REVIEW

I.

If a Defendant in a Federal criminal prosecution raises the defense of entrapment may the government show that he had a prior disposition to commit crime by introducing hearsay tending to prove the commission of other offenses by the Defendant and the Defendant's bad reputation in the community?

II.

If a government agent is allowed to testify as to statements made to him by informers concerning past offenses by the Defendant, is the Defendant, on demand at trial, entitled to the names of the persons who were the source of the hearsay?

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment 5, provides in part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .

Amendment 6 provides in part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . .

STATEMENT OF THE CASE

At her trial for possession of heroin with intent to distribute it,[1] Petitioner raised the issue of entrapment by cross-examination of the agent and by her own testimony.

Petitioner was a 21 year old heroin addict. She had never before been arrested. Separated from her husband, she and her small daughter were living with a man she had known for about a month.

Petitioner delivered 2.3 grams of heroin to a BNDD[2] agent for Fifty Dollars. The agent had been introduced to her by an informer.

According to Petitioner, she was told that the agent's wife was an addict badly in need of heroin. "Because I was a heroin addict, I know what it is like to be sick and I felt sorry for her". Petitioner also testified that she had

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[1] 21 USC 841.

[2] Federal Bureau of Narcotics and Dangerous Drugs.

never sold narcotics before and her only dealings in it were purchases for her personal use.

In rebuttal, the government called a local police officer who testified over objection:

> An informant or several informants have given my department and me in particular information concerning Sandra Haller and the gentleman she is living with . . . I was approached and told that heroin was being dealt from the apartment during the day and night, at all hours of the day and night; a lot of traffic in and out of the apartment, both black and white people . . . the Ft. Lauderdale Police Department informed me that their informant had also stated that Haller and Ball were both dealing in heroin from the apartment. From our own police department and records clerk who lived very close to the Hallers and Ball also advised me that the neighborhood was buzzing with rumors and people talking about the apartment.

Petitioner's counsel asked that the local police officer identify the informants who gave information concerning Petitioner. The police officer asserted that he believed the safety of the informants would be endangered if their identity was disclosed and consequently the Court declined to require him to name them.

The case was submitted to the jury under instructions which were not challenged in the Court of Ap etitioner was convicted and sentenced forthwith term of three years in prison.

REASONS FOR GRANTING THE WRIT

In *United States* v *Russell*....US....; 93 S Ct 1637 (1973), this Court re-examined the rationale of the defense of entrapment. This Petition does not ask the Court to re-travel that ground. On the contrary, the conclusion there marks the origin of our issue.

> Thus, the thrust of the entrapment defense was held to focus on the intent or predisposition of the defendant to commit the crime. 93 S Ct at 1641.

Whether the focus is broad enough to include the proable cause with which the officers acted in testing the defendant's predisposition to crime has not been a matter of agreement among the Circuits. In the First,[3] Second,[4] Third,[5] Fourth,[6] and Fifth[7] Circuits probable cause need not be shown to justify the actions of the officers in offering a defendant an opportunity to commit a crime. To the contrary, the Ninth[8] and Tenth[9] Circuits hold that once entrapment is an issue the government must show that the officers had reasonable grounds for believing that the accused was engaged in criminal activity.

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[3] *Whiting v United States*, 321 F2d 72, 76-77 (1963); *Kadis v United States*, 373 F2d 370, 373 (1967).

[4] *United States v Abdallah*, 149 F2d 219, 222, fn 1.

[5] *United States v Catanzaro*, 407 F2d 998, 1001 (1969).

[6] *United States v DeVore*, 423 F2 d 1069, 1071.

[7] *Kivette v United States*, 230 F2d 749, 754 (1956), *United States v Prieto-Olivas*, 419 F2d, 149, 151 (1969).

[8] *Carlton v United States*, 198 F2d 795, 798 (1952); *Trice v United States*, 211 F2d 513, 516 (1954).

[9] *Heath v United States*, 169 F2d 1007, 1010 (1948).

In the Eighth Circuit probable cause need not be shown but may be admissible on the question of the predisposition of the Defendant.[10]

If resolution of the foregoing conflict were all this Petition seeks, we might be hard put to justify intrusion upon this Court's busy schedule especially since the Court still remains so closely divided on the rationale of the defense of entrapment.[11] But the conflict runs much deeper.

The basic issue of entrapment is the predisposition of the defendant rather than the probable cause of the officers to act. The First Circuit has been extremely careful in keeping the two concepts separate.

> [The Court] charged the jury that the prosecution could establish the defendant's predisposition by showing that the agent knew that he was predisposed to commit the crime, either from "personal knowledge or from information from an established authority that is to be believed". This was either a total failure to charge on the more basic issue of predisposition as distinguished from probable cause, or a charge that on this basic issue hearsay could be considered.
> *Waker* v *United States*, 344 F2d 795, 797 (1965).

> Solicitation to commit a crime does not of itself involve constitutional rights, and it is not comparable to the arrest of person or to the invasion of premises. Furthermore, if the existence of probable

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[10] *Neill v United States*, 225 F2d 174, 178-180 (1955). [But compare *Mattson v United States*, 7 F2d 427 (1925). This may also be the Sixth Circuit rule. *Billingsley v United States*, 274 F 86 (1921).

[11] "No attempt will be made to analyze [the cases] or to decide on their application to the case before us, because the judges are divided respecting it. Consequently, the principles of law which have been argued cannot be settled . . ." *Etting v Bank of the United States*, 24 US [11 Wheat.] 59, 78, 6 L Ed 419, 423 (1826).

> cause, normally shown by hearsay evidence, is to determine who may and who may not be solicited, a defendant's exposure to temptation may depend upon circumstances over which he has no control, and for which he was in no way responsible. *Whiting* v *United States*, 321 F2d 72, 76 (1963).

Only two Circuits, the Fifth[12] and Ninth,[13] allow uncorroborated hearsay and "reputation" testimony to establish the defendant's predisposition.[14]

The First,[15] Third,[16] probably the Seventh[17] and Eighth Circuits,[18] do not allow such testimony.

The District of Columbia has its own rule that on the issue of predisposition of the defendant, prior offenses cannot be testified to even by an eye witness unless there is substantial corroboration.[19]

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[12] The opinion below, Appendix A, *infra; Hill v United States*, 328 F2d 988 (1964); *United States v Robinson*, 446 F2d 562 (1971). In the latter case, the Court indicated that the hearsay also bore on the question of probable cause. To the same effect see *Washington v United States*, 275 F2d 687, 690 (CA 5 1960).

[13] *Pulido v United States*, 425 F2d 1391, 1394 (1970). Here, the Court misread its earlier holding in *Trice*, *supra*, fn 8 that hearsay was admissible to prove the probable cause of the officers.

[14] The Court below describes the issue as being the "prior disposition" of the defendant rather than his predisposition. This is probably careless writing rather than expression of a new concept. Predisposition refers to a current state of mind or predilection. Cf. *Webster's New Dictionary Of Synonyms* (1968) 430, which discriminates incline, bias, dispose and predispose.

[15] *Whiting*, fn 3, *supra; Kadis*, fn 3, *supra;* and *Waker*, *supra*, p. 6.

[16] *Catanzaro*, fn 5, *supra*.

[17] *United States v Collier*, 313 F2d 157, 159-160 (1963) [Dictum]. Cf *United States v Johnston*, 426 F2d 112 (1970) where the Seventh Circuit follows the District of Columbia rule.

[18] Cf *Mattson v United States*, 7 F2d 427 (1925).

[19] *Hansford v United States*, 303 F2d 219, 224-226 (1962).

Hearsay is usually admitted on the issue of probable cause. It is hardly necessary to cite the search warrant cases and the search-following-arrest cases of this Court. But the hearsay is sifted and evaluated by a judicial officer rather than a jury. Although the judicial officer is engaging in a fact-finding function, he is not deciding the ultimate question, the guilt or innocence of the defendant. He is acting before trial on a motion to suppress or in issuing a warrant.

If we allow a jury to determine probable cause based upon hearsay, there is a grave danger that the jury will improperly consider the hearsay in determining guilt. Even the Fifth Circuit recognizes this when its attention is not diverted by the entrapment issue. *United States* v *Johnson,* 439 F2d 882 (1971);[20] *McMillan* v *United States,* 363 F2d 165 (1966).

One stark conflict stands out in the confusion of opinions we have cited. For whatever reason assigned, in the Fifth, Ninth and Tenth Circuits, if a defendant interposes the defense of entrapment, he gives the government the right in rebuttal to attack the defendant with hearsay, rumor and street gossip to show that the defendant is a bad person or has committed crimes in the past for which he has not been brought to justice. On the contrary, in the First, Third, Seventh, Eighth and District of Columbia Circuits such testimony is inadmissible. The conflict relates not to the scope of the inquiry but the quality of the evidence. Can a "searching inquiry"[21] be based upon rumor and street gossip?

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[20] Citing and relying upon the Third Circuit decision in *Catanzaro, supra,* which the Fifth Circuit refuses to follow in entrapment cases.

[21] . . . if the defendant seeks acquittal by reason of entrapment, he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition. . . . *Sorrells v United States,* 287 US 434, 451(1932).

This is the conflict which should be resolved in this Court.

II.

Rugendorf v *United States*, 376 US 528 (1964) held that the government could withhold the identity of an informer who furnished the information to obtain the search warrant. The defendant there did not assert that the identity of the informer was necessary to defend himself at trial on the merits. *McCray* v *Illinois*, 386 US 300 (1967) dealt with nondisclosure of informants at a preliminary hearing to determine probable cause for arrest and search. It was decided under the Fourteenth Amendment. *Roviaro* v *United States*, 353 US 53 (1957) held that an accused was entitled to the name of an informer who witnessed the crime charged in the indictment.

None of these cases precisely covers the fact situation which we tender to the Court. The city police officer said that the defendant's reputation and the reputation of the apartment in which she lived for being a center of narcotics activity was based upon statements made by four unidentified informants. It was utterly impossible to cross-examine the officer as to either the source of the information or its contents and accuracy. In effect, in violation of the confrontation clause, defendant had her guilt turn upon the testimony of four nameless and faceless witnesses.[22]

---

[22] At trial defense counsel stated:

> My client has categorically stood upon this stand and denied that she was involved in the sale of narcotic drugs and for her now to be impaled upon the testimony of this officer and not to be permitted to seek out these people to try to ascertain the truthfulness of the testimony or exactly how it came about would be denying to her a fair trial and would also be denying to her an opportunity to seek out those who are indirectly her accusers, and they are depriving her of her Sixth Amendment Rights [Trial transcript 86].

The rule of the Fifth Circuit is contained in *Rocha* v *United States,* 401 F2d 529, *cert. den.* 393 US 1103 (1968). There, under a similar fact situation, the Court held:

> The informer who gave this report to the agent was not a witness to the alleged offense as in [*Roviaro*]. The Appellant's situation more nearly resembles that presented in [*McCray*] in which it was held that the identity of the informer did not have to be disclosed on an issue of probable cause.

Since the issue of probable cause in *McCray* was being determined in a pre-trial hearing and the jury in no way was getting the information contained in the hearsay statements, it seems clear that *McCray* has no application. Here, of course, the jury heard the city detective relate the hearsay statements which were to be considered by them in determining whether the defendant was predisposed to commit the crime charged in the indictment.

The ruling below conflicts with the District of Columbia rule that if evidence of other offenses is going to be introduced to show the defendant's predisposition to crime, such evidence must be strongly corroborated. *Hansford* v *United States,* 303 F2d 219.

CONCLUSION

Petitioner's present counsel was not retained until July 26, 1973, and then only in connection with a matter unrelated to this Petition. His first opportunity to examine the file was on July 27, 1973. Believing that the issues presented by this record are important enough for review by the Supreme Court, counsel moved with all dispatch to prepare this Petition. It will be filed in typewritten form on August 2, 1973, along with the docketing fee and the printed Petition will be filed on Monday, August 6th, 1973.

Although the Petition is out of time by approximately five weeks, the court does have the jurisdiction to consider it. *Taglianetti* v *United States,* 394 US 316 (1969); *Schacht* v *United States,* 398 US 58 (1970) [a delay of 101 days in filing the Petition].

The Petition tenders to the Court two closely related questions which have never been considered by the Court and upon which there are considerable diverse views in the Courts below. The Petition for Certiorari should be granted to resolve the conflict.

VARON, STAHL and KAY, P.A.
and PHILIP A. GILLIS
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Dated: August 1, 1973.

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-2734

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

EDDIE BROOKS, WILLIE LUMDY
and SANDRA HALLER,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

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(April 25, 1973)

Before BROWN, Chief Judge, WISDOM and AINSWORTH, Circuit Judges.

PER CURIAM: Eddie Brooks, Willie Lumdy, and Sandra Haller appeal from their conviction for possession and distribution of a narcotic controlled drug, heroin, in violation of 21 U.S.C. § 841. We affirm.

The appellants raise several contentions. Appellant Haller contends that the trial court erred in admitting into evidence certain statements concerning her reputation. At trial, Haller took the stand and testified that she was en-

trapped. The trial court later allowed a government witness to testify that several unnamed informants told him that Haller had been involved in other narcotic transactions. Haller argues that the agent's testimony was inadmissible hearsay and that the names of the informers should have been revealed. We disagree. In *Rocha* v *United States,* 5 Cir. 1968, 401 F2d 529, *cert. den.* 393 U.S. 1103, we held that when entrapment is asserted as a defense, hearsay is admissible to show prior disposition to commit an offense charged in the indictment and that the government is not required to disclose the names of the informants.

Haller also contends that the evidence established that she was entrapped. Brooks contends that the trial court erred (1) in refusing to give a requested jury instruction as to the government's burden in proving entrapment and (2) in ruling that Brooks was not entrapped at a matter of law. Lumdy contends (1) that the jury selection plan, allegedly excluding Latin-Americans and persons between 21 and 25, denied his right to a jury of his peers; (2) that Congress exceeded its power under the commerce clause in enacting 21 U.S.C. § 841(a)(1); (3) that the trial court erred in denying his motion for severance; (4) that there was insufficient evidence to show for the jury to find him guilty of the offenses charged; and (5) that there was a failure to republish Schedule I as required by 21 U.S.C. § 812.

We find no merit in any of these contentions. The decision of the district court must therefore be affirmed.

Affirmed.

APPENDIX B

PROPOSED JUDGMENT*

No. 72-2734

Appeal from the United States District Court for the Southern District of Florida

Before BROWN, Chief Judge, WISDOM and AINSWORTH, Circuit Judges.

This cause came on to be heard on the transcript of the record of the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

April 25, 1973

Issued as Mandate:

(As to Sandra Haller only)

---

*Counsel is advised that as of August 2, 1973, this judgment, because of a clerical error, has not yet been entered.

APPENDIX C

ORDER

No. 72-2734

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING

(May 31, 1973)

Before BROWN, Chief Judge, WISDOM and AINSWORTH, Circuit Judges

PER CURIAM: It is ordered that the Petition for Rehearing filed on behalf of Sandra Haller in the above entitled and numbered cause be and the same is hereby denied.

Signed by all three judges

SUPREME COURT, U. S.
FILED
NOV 7 1973
ROBERT SEAVER, JR., CLERK

No. 73-225

In the Supreme Court of the United States

OCTOBER TERM, 1973

SANDRA HALLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
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Assistant Attorney General,
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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-225

SANDRA HALLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 477 F. 2d 453.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1973. A petition for rehearing was denied on May 31, 1973. The petition for a writ of certiorari was filed on August 2, 1973, and is thus substantially out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether hearsay testimony may be admitted to establish predisposition to commit the crime when entrapment has been raised as a defense.

2. Whether the defendant is entitled to disclosure of the names of confidential informers whose hearsay statements are admitted on the issue of predisposition.

STATEMENT

Petitioner was convicted, following a jury trial in the United States District Court for the Southern District of Florida, on two counts of a seven-count indictment charging her and three co-defendants (tried separately) with possession and sale of heroin, in violation of 21 U.S.C. 841. She was sentenced to concurrent terms of three years' imprisonment followed by a special parole term of three years (Tr. 165). The court of appeals affirmed (Pet. App. A).

1. Federal narcotics agent Walde testified that on May 17, 1972, working as an undercover agent, he and an informant, Stone, went to petitioner's apartment in Oakland Park, Florida, to see a suspected drug dealer, Mike Ball, who lived there with petitioner (Tr. 10). At the apartment they encountered petitioner, who was leaving with several other people. Petitioner asked Stone and agent Walde to watch the apartment until she returned. When she returned from an errand with an unidentified male, Stone asked petitioner if they could "cop some stuff," *i.e.*, purchase some heroin (Tr. 11). She agreed and asked them to return in 15 minutes. When they returned, petitioner was standing outside the apartment. Agent Walde attempted to give her fifty dollars on the street, but petitioner said "That's not cool. Let's get in the car" (Tr. 12). Agent Walde,

Stone and petitioner then got into the agent's car. Petitioner told the agent that the 15 minute delay was required because she didn't want to deal while the other man, who had accompanied her back to the apartment, was present (Tr. 22). Petitioner was concerned about whether agent Walde was "cool," since she had never met him. She was satisfied, however, after seeing a driver's license, that he was not "the heat," *i.e.*, a policeman (Tr. 13). Petitioner handed agent Walde a foil package which she said contained five "dime bags," for which the agent paid her $50 (Tr. 12). The contents of the bags were subsequently found to be heroin (Tr. 15). Agent Walde testified further that no representations were made to petitioner as to the intended use of the heroin and that she exhibited no reluctance whatever to make the sale (Tr. 26-27). On May 23, 1972, petitioner went with the agent and Stone to see co-defendant Brooks for a second purchase (Tr. 64).

Petitioner admitted the sale of heroin, but claimed that she was entrapped. Testifying in her own behalf, petitioner claimed that when Walde and Stone appeared at her apartment, "they asked me if I could get them some [heroin], and I said no, I didn't want to in particular. * * * I was told that the agent's wife was an addict; that she needed it badly; that the man they usually got it from had been busted. * * * I said I didn't have any. I never keep any at the house" (Tr. 41).

Petitioner claimed that she had never sold heroin prior to this incident, although she had been an addict for "about two years." She stated that she had a narcotics habit requiring two bags of heroin a day, and she was under the influence of drugs when the two arrived (Tr. 47). Petitioner further testified that to her knowledge narcotics had never been sold at her apartment (Tr. 44),

Mike Ball was not dealing in heroin there (Tr. 45), and neither she nor Ball kept any quantity of drugs on the premises (Tr. 48). She acknowledged, however, that several people frequented her apartment to use drugs (Tr. 59) and that often the drug purchase and use constituted a group activity (Tr. 60). She testified that she got the narcotics from "John Love" some four or five blocks away (Tr. 54).

In rebuttal, the government presented hearsay testimony to show petitioner's predisposition to sell heroin. Officer Jack D'Ambrosia of the Oakland Park Police testified over petitioner's objections that petitioner had a reputation for dealing in drugs. Officer D'Ambrosia said (Tr. 78-79):

> I was approched [by several informants] and was told that heroin was being dealt from the apartment during the day and night, at all hours of the day and night; a lot of traffic in and out of the apartment, both black and white people.
>
> I watched the apartment for a while and saw heavy traffic, and I informed our uniformed division to also keep an eye on the apartment for me, and if anybody familiar or familiar to us involved in narcotics was seen leaving or entering the apartment, I wanted to know about it.
>
> * * * * *
>
> The Fort Lauderdale Police Department informed me that their informant had also stated that Haller and Ball were both dealing in heroin from the apartment. And from our own police department and records clerk who lived very close to the Hallers and Ball also advised me that the neighborhood was buzzing with rumors and people talking

> about the apartment, the large amount of traffic entering and leaving.

Officer D'Ambrosia testified that the informant, Stone, had related to him that petitioner was present when narcotics were sold there by Mike Ball, and "if Ball was not at home, Sandra Haller would sell the drugs" (Tr. 80-81). Informant Stone also related to the agent a specific sale by Haller to a known drug user, McFarland (Tr. 90). Petitioner was identified in police files as a heroin user (Tr. 106). On cross-examination by defense counsel, the informant reports were reviewed in detail. The sources of all reports of petitioner's reputation with respect to drugs, except for the names of four confidential informants, were disclosed to defense counsel.[1] A request for disclosure of the identities of the four informants was denied (Tr. 87-88).

During the course of the government's rebuttal testimony, the court instructed the jury (Tr. 101-102):

> * * * [A]s you were advised at the beginning of this case, it was stated to you that the defense was that of entrapment. The testimony of this witness concerning the defendant's reputation is admitted solely for the purpose of bearing upon her predisposition to commit the offense with which she is charged. * * * Does everyone understand that? [The jury indicates in the affirmative.] I will charge you at length on what entrapment is. But his testimony will only go to her willingness and readiness or predisposition to have committed the

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[1] The officer named the police records clerk (Tr. 88), identified the Ft. Lauderdale policewoman involved (Tr. 114), and turned over the report which had been given to the federal agents for introduction into evidence (Tr. 102).

offenses charged in the indictment, not that she actually did it.

At the time of trial, informant Stone's whereabouts were unknown (Tr. 23). McFarland was called by petitioner on surrebuttal and denied ever having purchased drugs from petitioner (Tr. 121-122). None of the other named sources of Officer D'Ambrosia's reputation testimony was called. In its general charge, the court instructed the jury on entrapment (Tr. 155-157). There were no objections to the charge (Tr. 160).

ARGUMENT

1. Petitioner challenges the trial court's admission of hearsay evidence for the purpose of establishing predisposition once the defense of entrapment has been raised. Predisposition is, of course, part of the government's burden once the defense of entrapment has been properly raised. As this Court held in *United States* v. *Russell,* 411 U.S. 423, relying on its prior decisions in *Sherman* v. *United States,* 356 U.S. 369, and *Sorrells* v. *United States,* 287 U.S. 435: "* * * [T]he thrust of the entrapment defense * * * focus[es] on the intent or predisposition of the defendant to commit the crime." 411 U.S. at 429. In *Sorrells,* the Court noted that "if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense." 287 U.S. at 451-452.

This Court has never determined the standards for admissibility of predisposition evidence,[2] and the

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[2] In *Sorrells,* Mr. Justice Roberts indicated in his separate opinion (in which Justices Brandeis and Stone concurred) that the rule established by *Sorrells* would permit the use of reputation testimony to establish predisposition. 287 U.S. at 458; and see the concurring opinion of Justice Frankfurter in *Sherman,* 356 U.S. at 382-383.

courts of appeals have adopted varying approaches.[3] In the present case the court of appeals, adhering to prior decisions of the Fifth Circuit, held that hearsay evidence was admissible to establish predisposition (Pet. App. A, p. 1a). While there appears to be some difference in the treatment of this issue by the various circuits (see note 3, *supra*), and while the Fifth Circuit rule may or perhaps should be subject to an exception where the particular hearsay evidence in question is

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[3] Cases in the Fifth and Ninth Circuits, including one in which certiorari was sought and denied, permit the use of hearsay to establish predisposition. See, *e.g.*, *United States* v. *Robinson*, 446 F. 2d 562 (C.A. 5), certiorari denied, 404 U.S. 959; *Thompson* v. *United States*, 403 F. 2d 209 (C.A. 5); *Pulido* v. *United States*, 425 F. 2d 1391 (C.A. 9). The Third Circuit has expressly rejected the use of hearsay. *United States* v. *Catanzaro*, 407 F. 2d 998. The First Circuit has rejected the use of hearsay in two decisions; however, in each case the evidence was inherently unreliable. *Waker* v. *United States*, 344 F. 2d 795; *Whiting* v. *United States*, 296 F. 2d 512. The Seventh Circuit has excluded hearsay when such evidence is found unreliable, *e.g.*, *United States* v. *Johnson*, 426 F. 2d 112, and admitted hearsay when such evidence is found to be reliable, *e.g.*, *United States* v. *Perry*, No. 72-1363, petition for writ of certiorari pending, No. 73-5091. Although noting that the prosecution is not subject to the usual restrictions on reputation and character evidence in showing predisposition, the Sixth Circuit has excluded hearsay in the form of information contained on file cards which the government agent admitted to be sometimes unreliable. *United States* v. *Ambrose*, Nos. 72-2190, 72-2191. Two other circuits have addressed the question only in terms of showing similar conduct, allowing such evidence in proper circumstances. *E.g.*, *United States* v. *Viviano*, 437 F. 2d 295 (C.A. 2), certiorari denied, 402 U.S. 983; *Hansford* v. *United States*, 303 F. 2d 219 (C.A. D.C.). The Eighth Circuit has held hearsay admissible on the issue of "probable cause" to initiate the transaction. *United States* v. *Siegel*, 16 F. 2d 134. However, as we noted in our opposition in *Perry* v. *United States*, *supra*, Sup. Ct. No. 73-5091; we are of the view that the government need not establish the basis for undertaking any investigation, so that evidence of the state of mind of government agents—hearsay or not—should not be admitted.

inherently unreliable or not probative and the evidence of entrapment substantial, resolution of this context-dependent, evidentiary question may properly be left to the courts of appeals. Cf. *United States* v. *Augenblick*, 393 U.S. 348, 355; *Palermo* v. *United States*, 360 U.S. 343, 353.

The hearsay testimony admitted here would pose a more troublesome question were the evidence of entrapment substantial. But here, the sole source of evidence on the entrapment issue was the somewhat vague and uncertain testimony of petitioner. She testified that the informant Stone told her that agent Walde's wife was an addict whose supplier had been "busted," and that she needed heroin[4] (Tr. 41). Whether or not the foregoing assertion would warrant submission of entrapment to the jury, the record is clear that in spite of her asserted reluctance to sell, petitioner nevertheless promptly and without any objective manifestation of reluctance agreed to make the sale, even though she had known Stone for only a month and had never met agent Walde before (Tr. 40, 42, 52-55).[5] Finally, since predisposition may be inferred from the evidence concerning the transaction itself, see, *e.g.*, *Waker* v. *United States*, *supra*, 344 F. 2d at 798, and since such evidence in this case was sufficient to support, if not compel, an inference of predisposition, the now

[4] Agent Walde denied that either he or Stone (as far as he was aware) had told petitioner that Walde's wife was an addict in need of heroin (Tr. 72). We note also that petitioner was initially uncertain as to whether she was told that the agent's wife was an addict before or after the sale (Tr. 50-51).

[5] The rapidity with which petitioner agreed to sell is in stark contrast to *Sherman*, where the government informer's own testimony showed that he was able to obtain narcotics from a fellow patient at a drug treatment clinic only after repeated requests and appeals to sympathy.

disputed hearsay evidence was cumulative and unlikely to have affected the jury's verdict.

2. The refusal of the district court to order disclosure of the identity of the four police informants who were the sources of some of the reputation testimony concerning petitioner did not violate her right to confront accusing witnesses guaranteed under the Sixth Amendment, since the informers' information did not relate to the criminal transaction at issue, and none of the unnamed informers was present at, or participated in, the sale of narcotics. See *McCray* v. *Illinois*, 386 U.S. 300, 309; *Roviaro* v. *United States*, 353 U.S. 53, 62. The court's decision not to require disclosure of their identities was based on considerations of safety of the informants and preservation of their usefulness for future investigations (Tr. 87) and did not constitute abuse of discretion.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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NOVEMBER 1973.

DOJ-1973-11

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UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION

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WO. 2-8745—WO. 2-8732

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I.

Conceding that "this Court has never determined standards for admissibility of predisposition evidence" in entrapment cases and as a result the several courts of appeals have adopted "varying approaches", the government argues that this Court should not grant certiorari because "resolution of this context-dependent, evidentiary question may properly be left to the courts of appeals."

For this jawbreaking pronouncement, the government relies upon *Palmero* v *United States*, 360 US 343. But *Palermo* was an entirely different situation. The court was construing a recently-enacted discovery statute, 18 USC 3500, which was quite explicit in its terms:

> Since we feel the statutory standard has guiding definiteness, it would be idle to attempt a minute enumeration of particular situations to which it is to be applied. 360 US at 353.

The defense of entrapment was born out of decisions of the courts rather than laws of Congress. This Court has yet to define the standards of proof. Indeed, it has never determined whether probable cause of the officers to act is even an issue.* The irreconcilable conflict of the circuits is the inevitable result.

The government downplays the conflict, admitting only that "there appears to be some difference in the treatment of this issue by the various circuits." But, to take only one example, contrast the rule of the Third Circuit:

> This brings us to the legal question whether, when entrapment is in issue, testimony reciting a statement of an absent person which in fact indicates that the accused was predisposed to criminal behavior should be admitted even for the stated limited purpose of showing that the officers were

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* In his concurring opinion in *Sorrells*, Justice Roberts read the opinion of the court as approving the practice of allowing the government to "show in rebuttal that the officer . . . has reasonable cause to believe the defendant was a person disposed to commit the offense." 287 US 458. As our petition notes, only the Ninth and Tenth Circuits require a showing of probable cause; the Fifth and Eighth Circuits allow a showing of probable cause; and the First, Second, Third and Fourth Circuits exclude all evidence on the subject.

> justified in or had probable cause for providing the accused with an opportunity to commit the crime in question. We hold that such evidence is inadmissible. *United States* v *Catanzaro,* 407 F 2d 998 (1969) 1001.

with the rule of the Fifth Circuit:

> We have repeatedly held that once the defense of entrapment is raised the government may introduce hearsay testimony concerning the defendants' past reputation as bearing upon the defendant's predisposition to commit the crime and the reasonableness of the conduct by the government agents.
>
> *United States* v *Robinson,* 446 F 2d 562 (1971)

That is *some* difference.

According to the government,

> The hearsay testimony admitted here would pose a more troublesome question were the evidence of entrapment substantial. [Government brief, page 8]

But the petitioner was hardly "vague and uncertain" in her testimony, as the government claims. For example, consider the following cross-examination of her:

> Q. Do you ever recall an occasion when you and Mike sold the agent something purporting to be heroin?
>
> A. Yes.
>
> Q. When was that?
>
> A. That was after I had stopped using heroin. I had people that had been—these people came

over, asked me to get them some. I said "No, Michael." I said, "No. I want no longer to be connected with it." And they went on and on and on and on, and finally, you know, we decided to get them off our backs.

Q. Is it your testimony that they hounded you and hounded you to buy heroin?

A. Hounded and hounded. They asked us. They were in need of it, so, you know, the man he had been getting it from, they couldn't get it and they needed it.

[Transcript, 62-63]

In opposing discretionary review, standard procedure is to suggest to the appellate court that the challenged ruling turns upon the peculiarities of the record below. But here the entrapment issue was raised* and the double and triple hearsay of the government was admitted only because it was raised. The record squarely presents the issue for review and the ruling of the Court of Appeals of the Fifth Circuit is squarely in conflict with those of at least four other circuits.

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* In this respect, the record differs significantly from that in *Perry v United States*, 478 F 2d 1276 (CA 7, 1973), cert. denied Nov. 5, 1973 (73-5091). Perry did not testify and the Court of Appeals found "no basis for submitting the issue of entrapment to the jury." *id*, 1277-1278.

The *Perry* opinion is instructive in its review of some of the conflicting decisions of the courts of appeals.

II.

McCray v *Illinois*, 386 US 300, 305 said only that, before trial, "when the issue is not guilt or innocence but . . . the question of probable cause" the Constitution does not require disclosure of the informer's identity in a State prosecution. It does not answer the question we present.

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